IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1143

In the matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT OF HABEAS CORPUS, *Petitioner*,

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

ARTHUR LAZARUS, JR.
Association on American
Indian Affairs, Inc.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Attorney for Petitioner

Of Counsel:

BERTRAM E. HIRSCH

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Whether the Status of the Patented Portions of a South Dakota Indian Reservation as Indian Country was Terminated, and State Civil Jurisdiction Imposed over Indians Thereon, by a Federal Law which Provided for Non-Indian Homesteading of the Unallotted and Unreserved Tribal "Surplus" Lands on Said Reservation	2
Statutes Involved	2
Statement of the Case	
Reasons for Granting the Writ	5
I. The Ruling of the Supreme Court of the State of South Dakota Directly Conflicts with a Decision of the Eighth Circuit Court of Appeals Construing the Identical Federal Statute	5
II. The Decision of the Court Below Is Inconsistent with this Court's Ruling in *Mattz* v. *Arnett* that Indian Reservations are not Abolished by Federal Laws which Merely Permit Non-Indian Homesteading of "Surplus" Reservation Lands	9
Conclusion	10
South Dakota Supreme Court Decision	Appendix A
Circuit Court Findings of Fact and Conclusions of Law and Judgment	Appendix B
Texts of Statutes Involved	Appendix C
United States Court of Appeals Decision	Appendix D

CITATIONS

Cases: Page

Application of DeMarrias, 77 S.D. 294, 91 N.W.2d 480 (1958) 7
City of New Town, North Dakota v. United States, 454 F.2d 121 (CA8 1972) 8
DeMarrias v. State of South Dakota, 206 F.Supp. 549 (D.S.D. 1962) 7
DeMarrias v. State of South Dakota, 319 F.2d 845 (CA8 1963) 7
Mattz v. Arnett,——U.S.——, 93 S.Ct. 2245 (1973)...9, 10
State of South Dakota v. DeMarrias, 79 S.D. 1, 107 N.W. 2d 255 (1961), cert. denied 368 U.S. 844 (1961) 7
United States ex rel. Condon v. Erickson, 478 F.2d 684 (CA8 1973) 8, 9
United States ex rel. Feather v. Erickson,——F.2d—— (CA8 December 7, 1973) 5, 7, 8, 10

Treaties and Statutes:

Treaty of February 19, 1867, 15 Stat. 505....2, 4, 5, 6, 7, 10
Act of June 24, 1874, 18 Stat. 167 ..... 5, 8
Act of March 3, 1891, 26 Stat. 989, 1035 ....2, 6, 7, 8, 9, 10
Act of June 17, 1892, 27 Stat. 52 9
Act of June 25, 1948, 62 Stat. 757, 18 U.S.C. 1151....2, 4, 7
28 U.S.C. 1257 2
28 U.S.C. 2101 2

IN THE

Supreme Court of the United States

October Term, 1973

No.

In the matter of the Application of Cheryl Spider DeCoteau, natural mother and next friend and on behalf of Robert Lee Feather and Herbert John Spider for a Writ of Habeas Corpus, *Petitioner*,

v.

The District County Court For The Tenth Judicial District, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Petitioner, Cheryl Spider DeCoteau, respectfully prays that a Writ of Certiorari be granted to review the judgment and opinion of the South Dakota Supreme Court, entered in this case on October 31, 1973.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is reported at 211 N.W.2d 843 (1973) and printed in Appendix A. The Findings of Fact and Conclusions

of Law and Judgment of the South Dakota Circuit Court for the Fifth Judicial Circuit are unreported. They are printed in Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3). The final judgment of the Supreme Court of the State of South Dakota was entered on October 31, 1973. In accordance with 28 U.S.C. 2101(c), this petition for a writ of certiorari is due on or before January 29, 1974.

QUESTION PRESENTED

WHETHER THE STATUS OF THE PATENTED PORTIONS OF A SOUTH DAKOTA INDIAN RESERVATION AS INDIAN COUNTRY WAS TERMINATED, AND STATE CIVIL JURISDICTION IMPOSED OVER INDIANS THEREON, BY A FEDERAL LAW WHICH PROVIDED FOR NON-INDIAN HOMESTEADING OF THE UNALLOTTED AND UNRESERVED TRIBAL "SURPLUS" LANDS ON SAID RESERVATION.

STATUTES INVOLVED

Articles 3 and 10 of the Treaty of February 19, 1867, 15 Stat. 505, Sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035, and 18 U.S.C. 1151 are set out in Appendix C.

STATEMENT OF THE CASE

On December 17, 1971 South Dakota brought dependency and neglect proceedings against Cheryl Spider DeCoteau, an enrolled member of the Sisseton-Wahpeton Sioux Tribe. The State sought to terminate the parental rights of Mrs. DeCoteau to her minor children, Robert Lee Feather and Herbert John

Spider. All of the incidents constituting the alleged dependency and neglect had occurred within the exterior boundaries of the Lake Traverse Reservation, as established under the 1867 Treaty, approximately 50 percent of the incidents occurring on federal trust lands and approximately 50 percent of the incidents occurring on "surplus" lands opened for homesteading in 1891 and patented to non-Indians. None of the incidents occurred on land (sections 16 and 36) set aside for common school purposes by the act of March 3, 1891.

The District County Court for the Tenth Judicial District assumed jurisdiction, and, on December 17, 1971, entered an order of temporary foster care for Herbert John Spider. On August 4, 1972, Mrs. DeCoteau moved the District County Court to dismiss the proceedings on the ground that all the incidents giving rise to said proceedings involved Indians and occurred in Indian Country and that, therefore, the Court lacked jurisdiction. The motion was denied on August 29, 1972, the Court ruling that the state courts have jurisdiction over Indians for actions occurring on non-Indian patented lands within the confines of the reservation.

On August 4, 1972 the District County Court continued its December 17, 1971 custody order with respect to Herbert John Spider and issued a custody order that Robert Lee Feather remain in the foster care arranged for him by South Dakota since March 12, 1971.

On August 31, 1972 Cheryl Spider DeCoteau petitioned the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That

Court found that petitioner and her children are duly enrolled members of the Sisseton-Wahpeton Sioux Tribe located on the Indian reservation where all of the alleged acts or omissions resulting in the dependency and neglect proceedings and custody orders occurred. The Court ruled, however, that incidents occurring on non-Indian patented lands within the treaty boundaries of the Lake Traverse Reservation did not take place in "Indian Country," and that, therefore, the District County Court's exercise of dependency and neglect jurisdiction and issuance of custody orders were proper. Accordingly, the Circuit Court denied the writ of habeas corpus.

Cheryl Spider DeCoteau appealed, assigning as error the Circuit Court's "conclusion of law . . . stating that the District County Court for the Tenth Judicial District has civil dependency and neglect jurisdiction over members of the Sisseton-Wahpeton Sioux Tribe residing within the exterior boundaries of the Lake Traverse Indian Reservation as established by the Treaty of February, 1867 when certain acts or omissions constituting a cause of action under the dependency and neglect laws of the State of South Dakota occur on non-Indian patented lands within the boundaries of said Reservation."

On October 31, 1973 the South Dakota Supreme Court filed its opinion affirming the Circuit Court's judgment. The Supreme Court ruled that the Act of March 3, 1891 disestablished the reservation status of the non-Indian patented portions of the Lake Traverse Reservation. In effect, the Court below further ruled that these portions of the 1867 treaty reservation are not Indian Country within the meaning of 18 U.S.C. 1151.

REASONS FOR GRANTING THE WRIT

I. The Ruling of the Supreme Court of the State of South Dakota Directly Conflicts with a Decision of the Eighth Circuit Court of Appeals Construing the Identical Federal Statute

The holding of the court below that Lake Traverse Reservation "surplus" lands opened to non-Indian settlement by the Act of March 3, 1891, 26 Stat. 989, 1035, are no longer within Indian Country, and that, therefore, Indians who commit acts or omissions in contravention of state laws on such lands are subject to the jurisdiction of state courts is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Eighth Circuit in *United States ex rel. Feather* v. *Erickson*,——F.2d——(CA 8 December 7, 1973). (The decision of the Eighth Circuit is printed in Appendix D.)

In *Feather*, the Federal court, construing the identical 1891 statute as the court below, held that "the boundaries of the Lake Traverse Reservation remain as they were established in 1867," and, therefore, that an offense committed by an Indian on non-Indian patented lands within such boundaries had occurred in Indian country and was not subject to State jurisdiction. The statutory background of this decision, and of the contrary holding of the South Dakota Supreme Court is as follows:

The Lake Traverse Indian Reservation was established by the Treaty of February 19, 1867, 15 Stat. 505. It was set apart as a "permanent" reservation. 15 Stat. 505, 506 (Art. 3). In 1874 the United States reaffirmed its commitment to maintain a permanent Lake Traverse Reservation. Act of June 24, 1874, 18 Stat. 167.

Between 1867 and 1891 no laws affected the boundaries of the permanent Lake Traverse Reservation. Then, in 1891, a law was enacted which is the crux of this litigation.

The Act of March 3, 1891, c. 543, 26 Stat. 989, 1035, follows the general pattern of surplus land statutes enacted between 1890 and 1910. The Act provided for allotments to each Indian who had not been allotted; for withholding lands for religious purposes; for setting aside Sections 16 and 36 in each township for common school purposes; and for the remaining "surplus" lands to be subject to entry under the homestead and townsite laws. The United States acted as trustee and credited the proceeds of the land sales to the trust account of the Tribe, with the funds to be used for the education and civilization of the Sisseton and Wahpeton Sioux Indians.

The South Dakota Supreme Court ruled that the 1891 Act dis-established the reservation status of the non-Indian patented lands within the 1867 Treaty boundaries of the Lake Traverse Reservation, summarizing its view in the following language (Appendix A, p. 4a):

> By the very terms of this Agreement, the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre purchased. The money was deposited in the United States Treasury and the United States agreed to pay interest thereon. All the money was to be used for the sole benefit of the Indians. This then was an outright cession and sale of lands by the Indians to the United States. The land sold was separated from the reservation by Congress and became part of the public domain. In this Agreement the United States did not contract to act as trustee to sell the land for the Indians and credit the proceeds to the tribe. The government agreed to purchase the land outright. Therefore, the tribal title was extinguished and the reservation disestablished. The unallotted lands so sold are no longer in "Indian Country."

This statement by the South Dakota Supreme Court contravenes the 1867 Treaty and is irreconcilable with and a misconstruction of 18 U.S.C. 1151 which defines Indian Country as including "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." The decision of the court below is based primarily on a construction of Section 30 of the 1891 Act that the "lands ceded and sold would be subject to the laws of the State of South Dakota." The relevant portion of Section 30 states (Appendix C, p. 20a):

> That the lands of said Agreement ceded, sold, relinquished and conveyed to the United States shall immediately . . . be subject only to entry and settlement under the homestead and townsite laws of the United States excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the state wherein located.

In *United States ex rel. Feather* v. *Erickson, supra,* the Eighth Circuit, overruling an earlier decision,[1] held that the Act of March 3, 1891 merely opened for settlement the unallotted and unreserved "surplus"

---

[1] *DeMarrias* v. *State of South Dakota,* 319 F.2d 845 (1963). The Act of March 3, 1891 has had a long prior history of judicial interpretation. *Application of DeMarrias,* 91 N.W.2d 480 (S.D. 1958); *State* v. *DeMarrias,* 107 N.W.2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961); *DeMarrias* v. *State of South Dakota,* 206 F. Supp. 549 (D.S.D. 1962); and the Eighth Circuit *DeMarrias* decision, *supra.* The South Dakota Supreme Court in its October 31, 1973 decision placed primary reliance on the federal *DeMarrias* decisions, now overruled.

lands within the Lake Traverse Reservation. The reservation, according to the Court, was not sold to the government outright and no portion of it was terminated. Construing the "subject to the laws of the state" clause in Section 30 of the 1891 Act, the Eighth Circuit stated that "in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the states," the clause most plausibly subjected only school lands to the laws of the state. Thus, based upon the legislative history, subsequent legislative treatment of the reservation, and the clear reservation termination language of contemporaneous enactments, the Federal court found that the clause did not express or clearly imply a Congressional intention to terminate the reservation status of the Lake Traverse lands opened for settlement. When reservations were abolished, more direct language was used.[2]

In addition to a direct conflict with *Feather,* the holding of the South Dakota Supreme Court is also irreconcilable with *The City of New Town, North Dakota* v. *United States,* 454 F.2d 121 (CA8 1972) and *United States ex rel. Condon* v. *Erickson,* 478 F.2d 684 (CA8 1973),[3] decisions where the Eighth Circuit, on closer factual situations analogous in all material respects to the Lake Traverse Reservation, found that the "surplus" lands opened for settlement on the Fort Berthold and Cheyenne River reservations respectively are in Indian Country. Although the reasoning in *Condon* compels a finding that the

[2] In 1874, for example, when Congress abolished certain reservation holdings of the Sisseton-Wahpeton Sioux, it used the words "ceded absolutely to the United States." Act of June 24, 1874, 18 Stat. 167.

[3] This Court cites *Condon* favorably in *Mattz* v. *Arnett,* — U.S. —, 93 S.Ct. 2245, fn. 23 (1973).

Lake Traverse Reservation is undiminished, the South Dakota Supreme Court never discussed *Condon.*

In summary, the decision of the court below presents a direct conflict with holdings of the Court of Appeals for the Eighth Circuit which only this Court can resolve.

II. The Decision of the Court Below Is Inconsistent with This Court's Ruling in Mattz v. Arnett that Indian Reservations Are Not Abolished by Federal Laws Which Merely Permit Non-Indian Homesteading of "Surplus" Reservation Lands.

The holding of the South Dakota Supreme Court is completely inconsistent with the decision of this Court in *Mattz* v. *Arnett,*———U.S.———, 93 S.Ct. 2245 (1973). *Mattz* held that the Klamath River Reservation was not terminated under an 1892 act providing for sale to the public of all unallotted, unreserved and unsettled lands "embraced in what was Klamath River Reservation" with payment of the proceeds to the Indians' benefit.

Although the 1891 Lake Traverse Reservation act is similar in purpose and effect to the act construed in *Mattz,* it more easily provides support for the position that portions of reservations owned by non-Indians are not terminated. Unlike the Klamath River Reservation, burdened with a legislative history of pre-1892 attempts to terminate it and with the fact that the Indians for whom the reservation was set aside had virtually abandoned it, the legislative history and continuous Indian occupation of the Lake Traverse Reservation unambiguously emphasize the fact that no portion of the permanent reservation has ever been terminated.

Mattz clearly controls the Lake Traverse Reservation situation. Yet, the South Dakota Supreme Court never mentioned *Mattz.*

CONCLUSION

The Lake Traverse Reservation was established by treaty in 1867. It has been Congressionally recognized and administered as an undiminished reservation ever since, as evidenced by repeated annual appropriations to support tribal activities throughout the treaty reservation. The 1891 Act does not indicate a purpose to withdraw federal authority over those portions of the reservation opened to non-Indian settlement.

Since large numbers of Sisseton-Wahpeton Sioux reside on the "surplus" lands, State asertion of jurisdiction infringes substantially on the sovereign treaty right of the Sisseton-Wahpeton Sioux to make their own rules and be governed by them, within an undiminished reservation. Indeed, a different conclusion would irreparably interfere with essential tribal relations, and impair the effective functioning of the Sisseton-Wahpeton Sioux as a tribe.

For the reasons set forth in this petition, Cheryl Spider DeCoteau, petitioner, urges this Court to issue a writ of certiorari to the Supreme Court of the State of South Dakota and also to reverse summarily the decision of that Court on authority of *Mattz* v. *Arnett, supra,* and *United States ex rel. Feather* v. *Erickson, supra.*

Respectfully submitted,

ARTHUR LAZARUS, JR.
Association on American
Indian Affairs, Inc.
600 New Hampshire Ave., N.W.
Washington, D.C. 20037

Attorney for Petitioner

Of Counsel:

BERTRAM E. HIRSCH

Filed
OCT 31, 1973

APPENDIX

Filed
Oct. 31, 1973

APPENDIX A

#11200-a-JMD

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

• • •

In the Matter of the APPLICATION OF CHERYL SPIDER DECOTEAU, natural mother and next friend and on behalf of ROBERT LEE FEATHER and HERBERT JOHN SPIDER for a WRIT OF HABEAS CORPUS,

Petitioner and Appellant,

v.

THE DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT, *Defendant and Respondent*

• • •

Appeal from the Circuit Court of Roberts County, South Dakota

• • •

HON. PHILO HALL, *Judge*

DOYLE, *Justice.*

This is an appeal from the judgment of the Circuit Court of Roberts County denying appellant's petition for a Writ of Habeas Corpus to release her two children from the custodial process of the district county court.

The essential facts are undisputed. Appellant, Cheryl Spider DeCoteau, is the mother of Robert Lee Feather and Herbert John Spider. All are members of the Sisseton-Wahpeton Sioux Tribe. The youngest child, Robert, was

given up for adoption by his mother on March 12, 1971. The older child was placed in a foster home by the county court after neglect and dependency proceedings were initiated by the Welfare Department. Both children are in foster home care at present by order of the county court of August 4, 1972.

It was stipulated by the parties that approximately fifty percent of the acts or omissions giving rise to the county court orders occurred on federal trust lands, and approximately fifty percent of said acts or omissions occurred on non-Indian patented lands, all within the exterior boundaries of the Lake Traverse Reservation, as originally established by the Treaty of February 19, 1867. 15 Stat. 505.

The appellant's petition for a Writ of Habeas Corpus challenged the jurisdiction of the state court. Whether the state court had jurisdiction depends on whether the non-Indian patented lands, where a portion of the acts or omissions occurred, are within "Indian Country".

In 1948 Congress enacted a statutory definition of what constitutes "Indian Country":

> "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." Act of June 25, 1948, c. 645, 62 Stat. 757, as amended 18 U.S.CA. § 1151 (1970).

If the non-Indian patented lands (situs) involved in the present case are within this definition of "Indian Country" then the state courts of South Dakota have no jurisdiction, for the law is established that state jurisdiction does not extend to Indians in "Indian Country". Williams v. Lee, 1959, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251; State of Arizona ex rel. Merrill v. Turtle, 1969, 9 Cir., 413 F.2d 683; Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res., 1956, 8 Cir. 231 F.2d 89; United States ex rel. Condon v. Erickson, D.C.S.D., 344 F.Supp. 777; Smith v. Temple, 82 S.D. 650, 152 N.W.2d 547; State v. Molash, 1972, S.D., 199 N.W.2d 591.

Numerous cases regarding state jurisdiction over Indians have beeen before this court and we have consistently held that if the reservation is disestablished by Congressional action and the situs of the act or crime is located on the portion of the reservation so dissolved, then the state courts have jurisdiction. Application of DeMarrias, 1958, 77 S.D. 294, 91 N.W.2d 480; State v. DeMarrias, 1961, 79 S.D. 1, 107 N.W.2d 255, cert. den., 368 U.S. 844, 82 S.Ct. 72, 7 L.Ed.2d 42; DeMarrias v. State of South Dakota, 1962, D.C.S.D., 206 F. Supp. 549; DeMarrias v. State of South Dakota, 1963, 8 Cir., 319 F.2d 845; State ex rel. Hollow Horn Bear v. Jameson, 1959, 77 S.D. 527, 95 N.W.2d 181; Wood v. Jameson, 1964, 81 S.D. 12, 130 N.W.2d 95.

In order to determine whether the non-Indian patented lands (situs) are in "Indian Country", it is necessary to review the history of the "Lake Traverse Reservation", now commonly known as the "Sisseton-Wahpeton Indian Reservation", and all applicable legislation pertaining thereto.

In 1867, the United States, by treaty, set aside a permanent reservation for the Sisseton and Wahpeton Bands.

Treaty of February 19, 1867, 15 Stat. 505, ratified April 15, 1867, Proclamation May 2, 1867:

> "Beginning at the head of Lake Travers[e], and thence along the treaty line of the treaty of 1851 to Kampeska lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty line of 1851 to the place of beginning."

On December 12, 1889, an "Agreement" was entered into between the United States Government and the Sisseton and Wahpeton Bands of the Dakota or Sioux Indians, Act of March 3, 1891, 26 Stat. 989 at 1036, whereby the Indians:

> "hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made."

This agreement further provided that the United States would pay to the Sisseton and Wahpeton Bands of Indians the sum of two dollars and fifty cents per acre for every acre thus ceded, sold, relinquished, and conveyed to the United States. It was agreed by the parties that this sum of money, with interest to accrue, would be held in the Treasury of the United States for the sole use and benefit of the Indians.

By the very terms of this agreement, the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre purchased. The money was deposited in the United States Treasury and the United States agreed to pay interest thereon. All the money was to be used for the sole benefit of the Indians. This, then, was an outright cession and sale of lands by the Indians to the

United States. The land sold was separated from the reservation by Congress and became part of the public domain.[1] In this agreement the United States did not contract to act as trustee to sell the land for the Indians and credit the proceeds to the tribe. The government agreed to purchase the land outright. Therefore, the tribal title was extinguished and the reservation disestablished. The unallotted lands so sold are no longer in "Indian Country".

Appellant contends that the purpose of the Act of 1891 was to make surplus lands available to settlers. There was nothing stated in the original Agreement of 1889 about settlers purchasing or moving to the unallotted land bought by the United States Government. The Act of 1891, ratifying the Agreement of 1889, contained a section pertaining to settlers. Section 30 states:

> "That the lands by said agreement ceded, sold, relinquished, and conveyed to the United State shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homstead and townsite laws of the United States, excepting the sixteenth and thirty-sixth section of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located * * *."

---

[1] South Dakota was admitted into the Union as a State on the express condition that its people do "agree and declare that they forever disclaim all right and title to * * * all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * *." Enabling Act of February 22, 1889, 25 Stat. 676, Vol. 1, SDCL p. 183, Art. XXII of our Constitution.

The Act of 1891, including this section, has been construed to mean that the lands so ceded and sold would be subject to the laws of the State of South Dakota. Application of DeMarrias, supra. In DeMarrias v. State of South Dakota, 1962, D.C.S.D., 206 F.Supp. 549, the court stated:

> "The said Acts of 1889 and 1891 and the President's Proclamation, supra, constitute explicit manifestations as of the effective dates thereof of an intent by the Congress to restore to the public domain all unallotted lands within the Lake Traverse Reservation which were being opened for entry and settlement under the homestead and townsite laws of the United States and to make those areas subject to the laws of South Dakota."

On appeal the Eighth Circuit, United States Court of Appeals, approved the United States District Court's "carefully considered opinion" and affirmed "the trial court's well-reasoned opinion". DeMarrias v. State of South Dakota, 1963, 8 Cir., 319 F.2d 845. We agree with these cases. Since the lands had been sold to the United States by the Indians, the United States Government could provide the terms by which this land would be settled and sold, and also provide what jurisdiction would be established for these lands.

Appellant contends that the reasoning in the cases of Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346, and City of New Town, North Dakota v. United States, 1972, 8 Cir., 454 F.2d 121, should apply to the case before this court. In our opinion these cases do not apply as they interpret a completely different type of Act than the Act of 1891 herein involved, which is a sale and cession Act of Congress disestablishing a portion of the Sisseton and Wahpeton Reservation.

Where the language of a statute is plain and unambiguous, there is no occasion for construction. Phelps v. Life Benefit, Inc., 67 S.D. 276, 291 N.W. 919; see generally, 50 Am. Jur., Statutes, §225.

We conclude that the Act of 1891 disestablished that part of the Sisseton and Wahpeton Indian Reservation embracing the non-Indian patented land and that the trial court correctly found that the district county court had jurisdiction over the appellant for the acts or omissions that occurred in "non-Indian Country".

Affirmed.

All the Justices concur.

APPENDIX B

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

Findings of Fact and Conclusions of Law

There having been filed in this Court by Cheryl Spider DeCoteau, the petitioner, a Petition for a Writ of Habeas Corpus, and the States Attorney having duly answered as provided by law; the above entitled matter having come on for hearing before the Court, in the Courtroom, in the Courthouse, in the City of Sisseton, County of Roberts and State of South Dakota, on the 31st day of August, 1972; the Petitioner appeared by her attorney, Bertram E. Hirsch, and the District County Court for the Tenth Judicial District appearing by Wallace R. Brantseg, States Attorney of Roberts County, South Dakota; and the Court having heard and considered all the evidence introduced by the said petitioner and no evidence having been

offered by the respondent; and the Court being fully advised in the premises now makes and enters the following:

FINDINGS OF FACT

I.

That the petitioner, Cheryl Spider DeCoteau, is a one-half blood enrolled member of the Sisseton-Wahpeton Sioux Tribe, and that said Cheryl Spider DeCoteau is the natural mother of Herbert John Spider and Robert Lee Feather.

II.

That Robert Lee Feather is a twenty-one thirty-seconds enrolled member of the Sisseton-Wahpeton Sioux Tribe.

III.

That Herbert John Spider is a twenty-nine sixty-fourths enrolled member of the Sisseton-Wahpeton Sioux Tribe.

IV.

That Herbert John Spider and Robert Lee Feather are presently in the custody of foster parents upon the Order of the District County Court for the Tenth Judicial District entered on the 3rd day of August, 1972, in the City of Sisseton, Roberts County, South Dakota.

V.

That all of the acts or omissions giving rise to the dependency and neglect proceedings before the District County Court and order of foster care commitment issued as part of said proceeding occurred within the exterior boundaries of the Lake Traverse Indian Reservation as established by treaty of February, 1867.

VI.

That a portion of the acts or omissions giving rise to the Order of the District County Court occurred on Non-Indian patented land which the Sisseton-Wahpeton bands of the Dakota Sioux Indians had sold or relinquished to the United States under the terms of the agreement which was ratified by acts of Congress, March 3, 1891; and that all of said land had been part of the original permanent reservation set apart for the Sisseton-Wahpeton Sioux tribe by the treaty of February 19, 1867.

VII.

That said land was opened for settlement by non-Indians under the homestead laws of the United States by proclamation of the President.

VIIII.

That other portions of the acts or omissions giving rise to the Order of the District County Court occurred on unpatented Indian land or Indian trust land owned by Melinda Spider, the grandmother of the petitioner and the great grandmother of Herbert John Spider and Robert Lee Feather; said land being described as Allotment number 936, constituting the Southeast Quarter of the Northeast Quarter (SE¼NE¼) of Section 10, in Township 123 North of Range 51 West.

IX.

That lots or tracts of non-Indian patented or deeded land and lots or tracts of unpatented Indian trust land are interspersed in a crazy-quilt pattern over the entire area within the boundaries of the Lake Traverse Indian Reservation as established by the treaty of February 19,

1867. From the foregoing Findings of Fact the Court now makes and enters the following:

CONCLUSION OF LAW

I.

That the District County Court for the Tenth Judicial District had jurisdiction to issue its Order effecting the custody of Herbert John Spider and Robert Lee Feather and to entertain a dependency and neglect proceeding involving said children, for the non-Indian patented land, upon which a portion of the acts or omissions giving rise to the Order of the District County Court occurred, is not within Indian Country.

II.

Let Judgment be entered accordingly.

Dated at Sisseton, South Dakota, this 31st day of August, 1972.

BY THE COURT:

Philo Hall
Circuit Judge

ATTEST:

Vivian Hove
Clerk

IN CIRCUIT COURT

FIFTH JUDICAL CIRCUIT

Judgment

The Petition of the above named petitioner having come on for hearing before this Court in the Courtroom, in the Courthouse, in the City of Sisseton, County of Roberts, State of South Dakota, on the 31st day of August, 1972, before the Honorable Philo Hall, Circuit Judge presiding, and the officers of the Court present; the Petitioner ap-

peared by her attorney, Bertram E. Hirsch, of New York City, New York, and the respondent appearing by Wallace R. Brantseg, the States Attorney, in and for Roberts County of Sisseton, South Dakota; the Court having heard and considered the petitioner's petition and being fully advised in the premises and having entered its Findings of Fact and Conclusions of Law which are incorporated herein by reference hereto as if the same were herein restated and being fully advised in the premises, Now Therefore,

IT IS ORDERED:

That the Petition of Cheryl Spider DeCoteau be and the same is hereby denied.

Dated this 31st day of August, 1972, at Sisseton, South Dakota.

BY THE COURT:
Philo Hall
Circuit Judge

ATTEST:
Vivian Hove
Clerk

APPENDIX C

Treaty of February 19, 1867

Article 3

For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissitons and Warpetons Sioux here represented, and also in consideration of the confiscation of all their annuties, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government,

and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent reservation, viz:

Beginning at the head of Lake Travers(e), and thence along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct line to Reipan or the northeast point of the Coteau des Prairie(s), and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

Article 10

The chiefs and head-men located upon either of the reservations set apart for said bands are authorized to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands upon the respective reservations, and shall have authority, under the direction of the agent, and without expense to the Government, to organize a force sufficient to carry out all such rules, regulations, or laws, and all rules and regulations for the government of said Indians, as may be prescribed by the Interior Department: Provided, That all rules, regulations, or laws adopted or amended by the chiefs and head-men on either reservation shall receive the sanction of the agent.

Act of March 3, 1891, 26 Stat. 1035.

SEC. 26. That the following agreement entered into on behalf of the United States by Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, commissioners on the part of the United States, on the twelfth day of December, eighteen hundred and eighty-nine, with the Sisseton and Wahpeton bands of Dakota or Sioux Indians now on file in the Department of the Interior, signed by said commissioners for the United States, and for said Indians by Simon Ananangmari and others, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

"Whereas, by section five of the act of Congress entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven, it is provided 'That at any time after lands have been allotted to all the Indian of any tribe, as herein provided, or sooner,' if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by the said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservations not allotted as such tribe shall from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress; and the form and manner of executing such release shall also be prescribed by Congress.

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians are desirous of disposing of a portion of the land set apart and reserved to them by the third article of the treaty of February nineteenth, eighteen hundred and sixty-seven, between them and the United States, and situated partly in the State of North Dakota and partly in the State of South Dakota:

Now, therefore, this agreement made and entered into in pursuance of the provisions of the Act of Congress approved February eighth, eighteen hundred and eighty-seven, aforesaid, at the Sisseton Agency South Dakota, on

this the twelfth day of December, eighteen hundred and eighty-nine, by and between Eliphalet Whittlesey, D. W. Diggs, and Charles A. Maxwell, on the part of the United States, duly authorized and empowered thereto, and the chiefs, head-men, and male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, witnesseth:

ARTICLE I.

The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation set apart to said bands of Indians as aforesaid remaining after the allotments and additional allotments provided for in article four of this agreement shall have been made.

ARTICLE II.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, the sum of two dollars and fifty cents per acre for each and every acre thereof, and it is agreed by the parties hereto that the sum so to be paid shall be held in the Treasury of the United States for the sole use and benefit of the said bands of Indians; and the same, with interest thereon at three per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of the said bands of Indians, or members thereof, as provided in section five of an act of Congress, approved February eighth, eighteen hundred and eighty-seven, and entitled "An act to provided for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes:"

Provided, That any religious society or other organization now occupying, under proper authority, for religious or educational work among the Indians, any of the land in this agreement ceded, sold, relinquished, and conveyed shall have the right, for two years from the date of the ratification of this instrument, within which to purchase the lands so occupied at a price to be fixed by the Congress of the United States: *Provided further,* That the cession sale, relinquishment, and conveyance of the lands described in article one of this agreement shall not take effect and be in force until the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, shall have been paid to said bands of Indians, as set forth and stipulated in article third of this agreement.

ARTICLE III.

The United States stipulates and agrees to pay to the Sisseton and Wahpeton bands of Dakota or Sioux Indians, parties hereto, per capita, the sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, being the amount found to be due certain members of said bands of Indians who served in the armies of the United States against their own people, when at war with the United States, and their families and descendants, under the provisions of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, and of which they have been wrongfully and unjustly deprived by the operation of the provisions of an act of Congress approved February sixteenth, eighteen hundred and sixty-three, and entitled "An act for the relief of persons for damages sustained by reason of depredation, and injuries by certain bands of Sioux Indians"; said sum being at the rate of eighteen thousand four hundred dollars per annum from July first, eighteen hundred and sixty-two, to July first, eighteen hundred and eighty-

eight less their pro rata share of the sum of six hundred and sixteen thousand and eighty-six dollars and fifty-two cents, heretofore appropriated for the benefit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians, as set forth in report numbered nineteen hundred and fifty-three, of the House of Representatives, Fiftieth Congress, first session.

The United States further agrees to pay to said bands of Indians, per capita, the sum of eighteen thousand and four hundred dollars annually from the first day of July, eighteen hundred and eighty-eight, to the first day of July, nineteen hundred and one, the latter date being the period at which the annuities to said bands of Indians were to cease, under the terms of the fourth article of the treaty of July twenty-third, eighteen hundred and fifty-one, aforesaid; and it is hereby further stipulated and agreed that the aforesaid sum of three hundred and forty-two thousand seven hundred and seventy-eight dollars and thirty-seven cents, together with the sum of eighteen thousand and four hundred dollars, due the first day of July, eighteen hundred and eighty-nine, shall become immediately available upon the ratification of this agreement.

ARTICLE IV.

It is further stipulated and agreed that there shall be allotted to each individual member of the bands of Indians, parties hereto, a sufficient quantity, which, with the lands heretofore allotted, shall make in each case one hundred and sixty acres, and in case no allotment has been made to any individual member of said bands, then an allotment of one hundred and sixty acres shall be made to such individual, the object of this article being to equalize the allotments among the members of said bands, so that each individual, including married women, shall have one hundred and sixty acres of land; and patents shall issue for the lands allotted in pursuance of the provisions of this

article, upon the same terms and conditions and limitations as is provided in section five of the act of Congress, approved February eighth, eighteen hundred and eighty-seven, hereinbefore referred to.

ARTICLE V.

The agreement concluded with the said Sisseton and Wahpeton bands of Dakota or Sioux Indians, on the eighth day of December, eighteen hundred and eighty-four, granting a right of way through their reservation for the Chicago, Milwaukee and Saint Paul Railway, is hereby accepted, ratified and confirmed.

ARTICLE VI.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof we have hereunto set our hands and seals the day and year above written.

ELIPHALET WHITTLESEY,
D. W. DIGGS,
CHAS. A. MAXWELL,
On the part of the United States.

The foregoing articles of agreement having been fully explained to us, in open council, we, the undersigned, being male adult members of the Sisseton and Wahpeton bands of Dakota or Sioux Indians, do hereby consent and agree to all the stipulations, conditions, and provisions therein contained.

Simon Ananangmari (his x mark), and others

SEC. 27. That for the purpose of carrying out the terms and provisions of said agreement there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated the sum of two million two hundred and three thousand dollars, of which amount the sum of five hundred and three thousand two hundred dollars shall be

immediately available, and the same, or so much thereof as may be necessary, shall be paid as follows, to wit: To the Sisseton and Wahpeton Indians, parties to this agreement, the sum of three hundred and seventy-six thousand five hundred and seventy-eight dollars and thirty-seven cents, said amount to be distributed per capita. To the scouts and soldiers of the Sisseton, Wahpeton, Medawakanton, and Wapakoota bands of Sioux Indians, who were enrolled and entered into the military service of the United States and served in suppressing what is known as the "Sioux outbreak of eighteen hundred and sixty-two:" or those who were enrolled and served in the armies of the United States in the war of the rebellion, and to the members of their families and descendants, now living, of such scouts and soldiers as are dead, who are not included in the foregoing class, as parties to said agreement, the sum of one hundred and twenty-six thousand six hundred and twenty dollars, said amount to be distributed per capita; and the said sum of five hundred and three thousand and two hundred dollars or so much thereof as may be necessary, when paid to the said Sisseton, Wahpeton, Medowakanton, and Wahpakoota bands of Sioux Indians, their families and descendants, designated in this act, shall be deemed a full settlement of all claims they may have for unpaid annuities, under any and all treaties or acts of Congress up to the thirtieth day of June, eighteen hundred and ninety; *Provided however,* That all contracts or agreements between said Indians or any of them, and agents, attorneys, or other persons for the payment of any part of this appropriation for or on account of fees or compensation to said agents, attorneys or other persons, unless the same have been made, as provided by law, and are yet in force and have been approved by the Department of the Interior, or have been made by and between citizens of the United States are hereby declared null and void, and in such cases the Secretary of the Interior shall cause all moneys herein appropriated to be paid directly to the said

Indians and shall pay no portion of the same, to their said agents or attorneys. And in no event shall a sum exceeding ten per cent be paid to any agent or attorney, and the balance, after deducting the said five hundred and three thousand two hundred dollars, to wit, the sum of one million six hundred and ninety-nine thousand eight hundred dollars, or so much thereof as may be necessary, to pay for lands by said agreement ceded, sold, relinquished, and conveyed at the rate of two dollars and fifty cents per acre, shall be placed in the Treasury of the United States, to the credit of said Sisseton and Wahpeton bands of Dakota or Sioux Indians (parties to said agreement), and the same, with interest thereof at five per centum per annum, shall be at all times subject to appropriation by Congress or to application by order of the President for the education and civilization of said bands of Indians or members thereof.

SEC. 28. That any religious society or other organization now occupying under proper authority any of the lands by said agreement ceded, sold, relinquished, and conveyed shall have the right for a period of two years from the date hereof, within which to purchase the lands so occupied not exceeding one hundred and sixty acres in any one tract at the price paid therefor by the United States under said agreement.

SEC. 29. That in order to further carry out the provisions of said agreement and of this act, the Secretary of the Interior is authorized and directed, as soon as practicable, to cause the additional allotment provided for in said agreement to be made in the manner and form as provided in an act entitled "An act to provide for the allotments of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other purposes," and as provided in any existing amendments of said act, approved February eighth, eighteen hundred

and eighty-seven, and to pay the sums hereinbefore made immediately available, first to the parties to said agreement, or their proper representatives, and to appoint suitable officers for such purposes who shall furnish bonds usual in such cases, and whose compensation and expenses shall be paid out of said available funds as the Secretary of the Interior shall direct, and whose lawful acts, when approved by him, shall be final and conculsive.

SEC. 30. That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement, be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located; *Provided,* That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

18 U.S.C. 1151 (62 Stat. 757, as amended by 63 Stat. 94)

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian county", as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running throught the reservation, (b) all dependent Indian communities within the

borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1453 to 73-1459
and
Nos. 73-1541 to 73-1543

UNITED STATES OF AMERICA EX REL. JOHN LEE FEATHER, ET AL., *Petitioner-Appellant,*

v.

DON R. ERICKSON, Warden, South Dakota State Penitentiary, *Defendant-Appellee.*

Submitted: October 18, 1973

Filed: December 7, 1973

Before HEANEY, Ross and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

These consolidated habeas corpus appeals turn upon the issue of whether alleged criminal activity took place within "Indian Country." 18 U.S.C. § 1151. We hold that the alleged crimes were committed within the confines of the

Sisseton-Wahpeton (Lake Traverse) Indian reservation and therefore the State of South Dakota was without jurisdiction to convict appellants who are all enrolled Indians of the Sisseton-Wahpeton Indian tribe. The district court orders denying the writs of habeas corpus must be reversed.

"[A]ll land within the limits of any Indian reservation under the jurisdiction of the United States government, not withstanding the issuance of any patent * * *" is "Indian Country." 18 U.S.C. § 1151. Any Indian who commits certain specified crimes within Indian Country is subject to the exclusive jurisdiction of the United States. 18 U.S.C. § 1153.

The individual appellants were all convicted of crimes by a South Dakota State district court and are now incarcerated at the South Dakota State Penitentiary. The facts of the respective cases are not here important. The parties agree that if the crimes were committed in Indian country the federal district court had exclusive jurisdiction. Appellants seek release claiming they were wrongfully tried by the state court for offenses over which only the federal courts had jurisdiction.[1]

This court has previously had occasion to rule on the issue of whether the land within the original boundaries of the Lake Traverse reservation remains Indian country for 18 U.S.C. § 1151 purposes. *DeMarrias* v. *State of South Dakota*, 319 F.2d 845 (1963).[2] In *DeMarrias* this court adopted the trial court's opinion and determined that

[1] Two of the appellants claim tribal authority to deal with the crimes committed (forgery). 18 U.S.C. § 1152. Forgery is not one of the specified crimes within 18 U.S.C. § 1153.

[2] The case had a long prior history before reaching our court. *State* v. *DeMarrias*, 107 N.W.2d 255 (S.D. 1961), cert denied, 368 U.S. 844 (1961); *DeMarrias* v. *State of South Dakota*, 206 F. Supp. 549 (D.S.D. 1962). See also *Application of DeMarrias*, 91 N.W.2d 480 (S.D. 1958).

Congress had restored the reservation land to the public domain and thereby removed it from the category of Indian country. See *DeMarrias, supra* affirming 206 F. Supp. 549 (D.S.D. 1962). For reasons that will become evident we find it necessary to depart from the holding in *DeMarrias*.

The Lake Traverse reservation was established by treaty between the United States and the Sisseton-Wahpeton Sioux Indians in 1867. 15 Stat. 505. The reservation was said by Congress to be "permanent." 15 Stat. 505, 506 (Art. III).

Following the pattern as established in the General Allotment Act of February 8, 1887[3] the "surplus" land within the Lake Traverse reservation was opened to non-Indian settlers after allotments were made to individual members of the Sisseton-Wahpeton tribe. Act of March 3, 1891. 26 Stat. 989, 1036. The area opened for settlement by the 1891 Act included all of the reservation that had not been previously allotted to tribe members.[4] The essential provisions of the 1891 Act reflect the agreement reached between the government and the Indians on December 12, 1889 whereby the Indians agreed to "cede, sell, relinquish, and convey" the surplus lands to the United States. 26 Stat. 1036 (Art. I). In turn, the lands were opened for settlement:

> * * * the lands by said agreement ceded, sold relinquished and conveyed to the United States shall

[3] 24 Stat. 388. For an excellent general discussion of the General Allotment Act see *Mattz* v. *Arnett*, — U.S. —, 93 S. Ct. 2245, 2253-2254; F. Cohen, *Handbook of Federal Indian Law* (1942) at 78-79, 207-217.

[4] The 1891 Act also made provision for some additional allotments to the Sisseton-Wahpeton tribe as reparations for their loyal service to the country during the 1862 Sioux uprising. 26 Stat. 989, 1037, 1039. See also the preamble to the original treaty of 1867. 15 Stat. 505; S. Ex. Doc. No. 66, 51st Cong., 1st Sess. (189) at 1.

> immediately, • • • be subject only to entry and settlement under the homestead and townsite laws of the United States • • •. 26 Stat. 1039 (§ 30).

President Benjamin Harrison formally proclaimed the lands opened for settlement. 27 Stat. 1017.

We must answer this question: Did the 1891 Act either on its face, or alternatively, when considered with the contemporaneous and subsequent legislative history, manifest Congressional intent to diminish the Lake Traverse reservation boundaries?

We have these guidelines: (1) Intent to abrogate treaty rights is not lightly imputed to Congress. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 413 (1968); (2) Congress having once established a reservation, all tracts remain a part of that reservation until separated therefrom by Congress. *United States* v. *Celestine*, 215 U.S. 278, 285 (1909); *Seymour* v. *Superintendent*, 368 U.S. 351, 359 (1962). Indeed, Congressional intent to disestablish the reservation must be either expressed on the face of the Act or be clearly discernible from the "surrounding circumstances and legislative history." *Mattz* v. *Arnett*, —— U.S. ——, 93 S. Ct. 2245, 2258 (1973); *United States ex rel. Cordon* v. *Erickson*, 478 F.2d 684, 689 (CA8 1973); (3) Opening an Indian reservation for settlement by homesteading is not necessarily inconsistent with its continued existence as a reservation. *Seymour, supra. See also Condon, supra; The City of New Town, North Dakota* v. *United States*, 454 F.2d 121, 125 (CA8 1972); (4) The well-preserved general rule is that Indians are to be left free from state jurisdiction and control. *McClanahan* v. *State Tax Commission of Arizona*, —— U.S. ——, 93 S. Ct. 1257 (1973); *Condon, supra* at 689 and citations. Federal jurisdictional is preferred. *McClanahan, supra.*

The case before us is not unlike *Seymour, Mattz* and *Condon*. The overall climate of legislative activity concern-

ing Indian reservation during the period from 1887 through 1910 received its primary impetus from the General Allotment Act. See *Cohen, supra* at 78-80 (§§ 11-13). The 1891 Act, by its express terms, refers to the General Allotment Act of 1887. Just as in the beforementioned three cases, the reservation here was not sold to the government outright but merely opened for settlement under the homestead laws and the 1887 general allotment plan. Allotment and homesteading do not suggest congressional purpose to terminate the reservation. *Seymour, supra.*

Appellee leans upon a phrase extracted from section 30 of the 1891 Act.[5] The phrase ", and be subject to the laws of the state wherein located" is read by appellee to confer state jurisdiction upon the entire portion of land opened to homesteading. Appellant argues a misplaced comma and contends that only school lands, section sixteen and thirty-six, are subject to state jurisdiction. Appellant's argument is more plausible in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the states. *See, e.g.*, 33 Stat. 319, 323; 35 Stat. 458, 459; 35 Stat. 460, 461; *Cordon, supra* at 687 n. 5 (specifically granting said sections to the states) and 28 Stat. 314, 319; 28 Stat. 326, 332; 31 Stat. 672, 676 (using the same language as the instant statute but no comma placed before the "and" of the "subject to state law" clause). We do not read this clause as a clear indication of congressional intention to terminate the Lake Traverse reservation. *Seymour, Mattz, Condon,* all *supra.*

---

[5] The relevant portion of section 30 states:
"That the lands by said agreement ceded, sold, relinquished and conveyed to the United States shall immediately, • • • be subject only to entry and settlement under the homestead and townsite laws of the United States, *excepting the sixteenth and thirty sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the state wherein located* • • •." 26 Stat. 1039 (§ 30) (emphasis supplied.)

The *Mattz* case makes clear that Congress, during the legislative years surrounding the 1891 Act "was fully aware of the means by which termination could be effected." *Mattz, supra* at 2258 & n. 22. Clear language such as that discussed in *Mattz* expressing intent to discontinue the Lake Traverse reservation is nowhere to be found in the 1891 Act here involved.

Nothing that can be gleaned from the legislative history or subsequent legislative enactments can be fairly said to shed any further light upon the intent of the Congress regarding the reservation boundaries. The Committee reports on the 1891 Act [6] and reports on similar bills were not enacted [7] do not discuss the proposed boundaries. The only direct reference to the boundaries of the reservation subsequent to the 1891 Act came from President Harrison in his proclamation opening the lands "*within* the Lake Traverse Reservation" to settlement. (emphasis supplied) 27 Stat. 1017. This reference is by no means conclusive.

Unlike the subsequent legislative treatment in *New Town* the latter congressional enactments here are not "admittedly inconsistent and confusing." *New Town, supra* at 125. *Accord, Condon, supra* at 688; *Seymour, supra* at 427 n. 12. Unlike *Mattz* we have here no evidence that "the House was generally hostile to continued reservation status of the land in question." *Mattz, supra* at 2255. Those decisions on closer factual situations found the reservations not to have been diminished.

We must view as significant the fact that our search of the legislative documents subsequent to the 1891 Act unearths no telltale language as to the lawmaker's will concerning the boundaries of the Lake Traverse reservation. The significance lies, of course, in the test to be applied.

---

[6] H. Rept. No. 2325, 51st Cong. 1st Sess. (1890); S. Rept. No. 1510, 51st Cong. 1st Sess. (1890).

[7] *E.g.*, S. Rept. No. 661, 51st Cong. 1st Sess. (1890); H. Rept. No. 2271, 51st Cong. 1st Sess. (1890); S. Ex. Doc. No. 66, 51st Cong. 1st Sess. (1890).

That is, congressional expression or clear implication diminishing the reservation boundaries.

Finally, we think it noteworthy that the South Dakota Supreme Court, while interpreting an Act similar to the Act in issue here, has recognized the principles established in *Seymour* and *New Town* and denied state jurisdiction in an analogous situation. *State* v. *Molash*, 199 N.W.2d 591 (1972).

Congress established the Lake Traverse reservation as a "permanent" reservation in 1867. Since that time Congress has not through clear expression or by innuendo shown an intention to disestablish.

The result we reach today is, of course, contrary to the result we reached in 1963. *DeMarrias, supra.* The more recent teachings of the United States Supreme Court and of this Court, set above, have been premised upon legislative enactments and history analogous in all material respects to the instant case. To reach a different result in this case would be, we think, to ignore the clear impact of the decisions discussed above. We therefore now hold that the body of legislative documents concerning the Lake Traverse Indian reservation does not, against the glare of *Seymour* and the more recent judicial guidance in *Mattz, Condon* and *New Town*, demonstrate congressional intention to disestablish the reservation.

The boundaries of the Lake Traverse Indian reservation remain as they were established in 1867. The scene of the alleged crimes is, therefore, within Indian country. South Dakota had no jurisdiction to try appellants. The writs of habeas corpus should have been granted.

Reversed and remanded for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT